FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** VFV

DATE: **November 1, 2023**

SUBJECT: **AO 2023-06 (Texas Majority PAC) Comment**

Attached is a comment received from Elias Law Group regarding AO 2023-06 This matter is on November 2, 2023 Open Meeting Agenda.

Attachment

250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

ELIAS LAW GROUP

November 1, 2023

Federal Election Commission
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2023-6

Dear Acting General Counsel Stevenson:

We write on behalf of Texas Majority PAC (***"TMP"***) regarding Drafts A and B in response to Advisory Opinion Request 2023-6. We appreciate the Federal Election Commission's ("***Commission's***") careful consideration of TMP's request and agree with most of the legal framework set forth in Draft A.

However, the Commission should reconsider its classification of certain Paid Canvassing expenses as non-communication expenditures.[1]

First, the proposed classification of "hiring and training paid canvassers" and managing paid canvassers as non-communication expenditures conflicts with the Commission's precedents and its current reporting instructions. Because these expenditures are necessary to efficiently distribute the canvassing communications, they qualify as core distribution costs. They are directly tied to particular communications and cannot be repurposed for any non-communicative use. They are plainly "direct inputs or components" of that communication. Not recognizing them as such in this context would open the door for distribution costs (e.g., payments to television ad buyers) to be classified as non-communication expenditures (contributions) in other contexts as well – most notably, other communications (e.g., non-express advocacy communications) that fail the content prong. That would upend the regulated community's longstanding reliance on Section 109.21 as *the* arbiter of how communications are regulated.

Second, Draft A's additional proposed classifications – for "hiring vendor consultants" and "creating and managing a canvass questionnaire" – appear to assume facts that are not in TMP's request or supplemental materials. Due to the lack of detail about which expenses comprise these

[1] We incorporate the same definition of "Paid Canvass" from our Advisory Opinion Request herein.

broader categories, TMP cannot discern from Draft A which expenses would qualify as non-communication expenditures (contributions) and which would qualify as communication expenditures (not contributions). To the extent the Commission needs additional itemization of the paid canvassing vendor's expenses to render an opinion, TMP is happy to provide that additional detail and allow the Commission additional time to consider the request. We recognize that there are novel aspects to this request and it is important to spend the time to get it right.

I. The costs necessary to efficiently distribute a canvassing communication are direct inputs or components of the canvassing communication.

We agree with most of the legal framework set forth in Draft A.

For twenty years, the Commission has drawn a clear line between the communications it regulates and the communications it does not. It did so by promulgating 11 C.F.R. § 109.21 and, led by the Office of General Counsel and defended by Commission majorities, adhering closely to the principle (set forth in the regulation's Explanation and Justification) that 11 C.F.R. § 109.20 "addresses expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee."[2] Section 109.21, in turn, carefully distinguishes between electoral speech and nonelectoral speech, eliminating the uncertainty that plagued the regulated community during the *Christian Coalition* era and replacing it with a relatively clear set of rules.

The defense of Section 109.21 as *the* regulation governing coordinated communications has rested on two pillars: (1) distinguishing between public communications and other communications; and (2) defining communication expenditures with sufficient breadth to allow speakers to produce effective communications and efficiently distribute them to voters. Draft A is consistent with the first pillar. For the reasons set forth in our request and supplemental materials, we agree with Draft A's conclusion that the Paid Canvass does not involve "public communications," does not satisfy the content prong of the coordinated communications test, and is not a "coordinated communication." Draft B, in our view, diverges sharply from the text of the Commission's regulations and its longstanding precedents in finding that canvassing communications are "public communications." We also agree with Draft A's conclusion that "TMP seeks to make expenditures … for canvassing communications."

Draft A's proposed analytical framework is consistent with the second pillar: to ask whether expenses are "for canvassing communications themselves" or are "sufficiently direct inputs or components of the canvassing communications to be considered part of those communications." But where Draft A errs – and, in our view, errs with significant potential consequences for the regulated community – is in expressly classifying "hiring and training paid canvassers" and implicitly classifying the managing of paid canvassers as non-communication expenditures. That

[2] Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2023) (emphasis added).

undermines the second pillar that has undergirded the Commission's regulatory scheme: defining communication expenditures with sufficient breadth to allow speakers to produce effective communications and efficiently distribute them to voters.

A. Distribution costs *are* direct inputs or components of the canvassing communication.

Communication expenditures fall into two general categories: *production costs* and *distribution costs*. The cost of a television or radio ad includes the amounts paid to the media consultant to create and produce the ad; it also includes the amounts paid to television stations to place it and to the buyer for managing the distribution process. The cost of a mailer includes the amounts paid to the mail vendor to create and produce the mail piece; it also includes the amounts paid to the U.S. Postal Service ("***USPS***") to deliver it and to the mail vendor for managing that distribution process. Every medium of communication – whether public communication or non-public communication – follows this pattern.

The Commission's electioneering communications regulation mirrors this two-part cost construct, defining the "[d]irect costs or producing or airing electioneering communications" to include "(i) [c]osts charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent" (production costs) and "[t]he cost of airtime on broadcast, cable or satellite radio and television stations, studio time, material costs, and the charges for a broker to purchase the airtime" (distribution costs).[3] The Commission's Form 5 and Form 9 instructions likewise instruct the regulated community to report production costs and distribution costs.[4] And to the extent that Commission regulations exempt a particular type of communication from the definition of "contribution" or "expenditure," that exemption typically covers both production and distribution costs. For example, Commission regulations exempt "[t]he payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card …."[5]

In a recent case involving the activities of Correct the Record, the Commission and federal courts have grappled with defining when *production* costs associated with an exempt communication are sufficiently direct to be treated as communication expenditures. In resolving the Correct the Record matter at the administrative level, a controlling group of Commissioners relied largely on

[3] 11 C.F.R. § 104.20(a)(2)(i) – (ii).
[4] *See* FEC Form 5 Reporting Instructions, *available at* https://www.fec.gov/resources/cms-content/documents/policy-guidance/fecfrm5i.pdf (requiring disclosure of "purchases of radio/television broadcast/cable time, print advertisements and related production costs."); FEC Form 9 Reporting Instructions, *available at* https://www.fec.gov/resources/cms-content/documents/fecfrm9i.pdf (requiring speakers to disclose "(1) costs charged by a vendor (e.g., studio rental time, staff salaries, costs of video or audio recording media and talent) or (2) costs of airtime on broadcast, cable and satellite radio and television stations, studio time, material costs and the charges for a broker to purchase the airtime.").
[5] 11 C.F.R. § 100.80.

the principle – articulated in a 2013 matter involving Congressman Akin and unpaid Internet communications – that "[t]he Commission has narrowly interpreted the term Internet communication 'placed for a fee,' and has not construed that phrase to cover payments for services necessary to make an Internet communication."[6]

But the court adjudicating the Commission's administrative dismissal found the Akin matter to be inapposite. In remanding the Correct the Record matter to the Commission for resolution, the court warned that such an exemption must be "meaningfully bounded" to avoid abuse.[7] It was insufficient, in the court's view, for an expense to merely be an "input" to an exempt communication; instead, such expenses must be "themselves communications or sufficiently direct components of communications to be exempt."[8] Across multiple opinions, the court then articulated two principles to guide the Commission on remand. *First,* the court noted that the expenses in the matter before it "are far broader categories of expenses, and *far less directly connected to a specific unpaid internet communication*, than email-list rentals and donation-processing software purchased to enable email blasts."[9] *Second,* the court warned against exempting production expenses that "can just as easily be used to produce [nonexempt] versus [exempt] communications."[10] Stated affirmatively, the costs must bear a direct connection to a specific communication and should not be easily repurposed for a non-communicative use.

Notably, the Correct the Record matter involved *production* costs rather than *distribution* costs. The distinction is significant and one not acknowledged in Draft A. Unlike production costs – which can be repurposed for a non-communicative purpose – distribution costs are necessarily "directly connected to a specific … communication." The buying of a 30-second commercial block is directly connected to the 30-second television ad that airs in the block; the purchase of postage to send a mailer is directly connected to the mailer on which the postage is affixed; and the payment to individuals to deliver canvassing literature and the organization's message is directly connected to those canvassing communications. There can be no re-purposing of such expenses for non-communicative use. That is why, to our knowledge, neither the Commission nor any federal court has questioned whether the expenses associated with *distributing* a communication are "sufficiently direct components of communications" to be exempt. And the regulated community, until now, has relied on that presumption in structuring its communication programs.

B. The costs of hiring, training, and managing canvassers is a core distribution cost that is a sufficiently direct input or component of the canvassing communications.

---

[6] Factual and Legal Analysis, FEC Matter Under Review 6657 (Akin for Senate) (Sept. 17, 2013), at 3-4.
[7] *Campaign Legal Ctr. v. Fed. Election Comm'n*, 646 F. Supp. 3d 57, 64 (D.D.C. 2022) ("*CLC V")*.
[8] *Id.*
[9] *Campaign Legal Ctr. v. Fed. Election Comm'n*, 466 F. Supp. 3d 141, 157 (D.D.C. 2020) ("*CLC II"*), *on reconsideration in part*, 507 F. Supp. 3d 79 (D.D.C. 2020) ("*CLC III*"), *rev'd and remanded*, 31 F.4th 781 (D.C. Cir. 2022) ("*CLC IV*").
[10] *CLC V,* 646 F. Supp. at 65.

As Draft A acknowledges, the Paid Canvass includes expenditures for canvassing communications. To put a finer point on it, the Paid Canvass includes *two* such communications: (1) the literature that individual canvassers physically deliver to voters, and (2) the oral message that canvassers verbally deliver to voters. The canvasser distributes *both* canvassing communications. Therefore, the costs associated with the canvassers (along with any costs to transport the literature and the canvasser) are *the* distribution costs associated with any canvassing communications. They are analogous to the cost of television or radio airtime, advertising space in a newspaper or magazine, USPS postage for a mail piece, and payments to vendors to manage the distribution process. All such expenses are necessary to distribute the underlying communication. All such expenses are directly connected to specific communications. And such expenses cannot be repurposed for non-communicative use.

Despite this, Draft A concludes that the costs of "hiring and training paid canvassers" are "supportive expenses" that "are not for canvassing communications themselves" and are "not sufficiently direct inputs or components of the canvassing communications to be considered part of those communications." Draft A does not directly address whether the *compensation* of paid canvassers is a communication expenditure or a non-communication expenditure. If it falls into the latter category, however, the Commission is effectively concluding that *no* cost associated with distributing a canvassing communication is a communication expenditure. Such a ruling would contradict every Commission precedent that we have identified – all of which acknowledge that communications have distribution costs – and the Commission's reporting instructions on Forms 5 and 9.

On the other hand, perhaps Draft A is drawing a distinction between *compensating* paid canvassers (communication expenditure) and *hiring and training* paid canvassers (non-communication expenditure). But this distinction, too, finds no support in the Commission's regulations or precedents. One cannot pay a canvasser without first hiring the canvasser; and it costs money to hire canvassers. And while TMP could theoretically send untrained canvassers to deliver their canvassing communications, no reasonable (or responsible) organization would willingly do so. TMP's trainings will be specific to the Paid Canvass and will train canvassers on messaging: specifically, on TMP's philosophy, the candidates it supports, and the most effective way to deliver messaging to TMP's targets. The trainings serve no purpose other than facilitating and effectuating TMP's canvassing communications. They cannot be re-purposed for a non-communicative use.

Draft A also concludes that paying a canvassing vendor is a non-communication expenditure. But the principal role of a canvassing vendor is to hire, train, and manage the paid canvassers. Retaining a canvassing firm is analogous to a political organization retaining a broker to purchase television airtime. The organization could buy the time itself but it chooses to retain a professional that specializes in the relevant communication or medium to more effectively manage the communication distribution process. Likewise, TMP could hire, train, and manage

paid canvassers itself but it instead prefers to outsource this task to an experienced vendor. The Commission's regulations treat "the charges for a broker to purchase the airtime" as a "direct cost" of airing an electioneering communication.[11] There is no reasonable basis for the Commission to treat charges paid to a canvassing firm any differently.

II. Draft A classifies certain expenses as non-communication expenditures without sufficient information in the record to render such an opinion.

Draft A also concludes that the expenses associated with "hiring vendor consultants" and "creating and managing a canvass questionnaire" are non-communication expenditures. As noted above, the principal role of a canvassing vendor is to hire, train, and manage the paid canvassers. To the extent the Commission has concerns regarding other responsibilities that a paid canvassing vendor may have – and any other compensation received for such duties – that information is not currently in the record. Likewise, TMP's request makes no reference to a separate expense for "creating and managing a canvass questionnaire" and it is not standard for a canvassing firm to charge separately for it.

As the final paragraph of all Commission opinions note, the Commission's response "constitutes an advisory opinion concerning the application of the Act and Commission regulations *to the specific transaction or activity set forth in your request*." The current draft does not provide sufficient clarity on which expenses qualify as communication expenditures and which qualify as non-communication expenditures. To the extent that the Commission needs additional itemization of the paid canvassing vendor's expenses to render an opinion, TMP is happy to provide that additional detail and allow the Commission additional time to consider the request.

III. Conclusion

It is important that the Commission get this opinion right. Prior to its promulgation of 11 C.F.R. § 109.21, the Commission – and, by extension, the regulated community – struggled to define which types of communications qualify as "coordinated communications." By adhering to a clear distinction between communication expenditures and non-communication expenditures, the Commission has provided clear guidance to the regulated community about what is regulated and what is not. While the class of communication expenditures must be "meaningfully bounded" to avoid abuse,[12] its confines should not be so cramped to weaken Section 109.21's primacy in regulating coordinating communications.

The current version of Draft A would fundamentally change the ability of the regulated community to rely on Section 109.21, opening the door for a future Commission or court to find that expenses associated with distributing an exempt communication are "non-communication

[11] 11 C.F.R. § 104.20(a)(2)(ii).
[12] *CLC V*, 646 F. Supp. 3d at 64.

expenditures" governed by Section 109.20. For example, if an organization airing coordinated, non-express advocacy ads more than 90 days before a congressional election hires a broker to purchase airtime, must that organization worry whether the broker costs will be deemed "coordinated expenditures"? What if the same organization hires a consultant to manage digital ad inventory more efficiently for a similar program more than 120 days before a presidential election – would those expenses be deemed "coordinated expenditures"?

How the Commission defines communication expenditures in this context will affect how future Commissions and courts will interpret the same term in other contexts. It will also meaningfully change how the regulated community currently understands Commission rules and structures its communication programs.

Yours truly,

Jonathan Berkon
Courtney Weisman
Sarah Mahmood
Counsel for Texas Majority PAC